No. 76-1105

# In the Supreme Court of the United States

OCTOBER TERM, 1976

RAMSEY CLARK, APPELLANT

*v.*

J. S. KIMMITT, SECRETARY OF THE UNITED STATES SENATE, ET AL.

*ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

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*Washington, D.C. 20530.*

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### OPINIONS BELOW

The opinion of the court of appeals *en banc* (J.S. App. II, pp. 1–119) is not yet reported. The order of the district court certifying five questions to the court of appeals (J.S. App. I, pp. 52a–55a) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on January 21, 1977. A notice of appeal to this Court was filed on February 7, 1977 (J.S. App. I, p. 10a), and the jurisdictional statement was filed on February 9, 1977. Appellant invokes the jurisdiction of

this Court under 2 U.S.C. (Supp. V) 437h(b). See *Buckley* v. *Valeo,* 424 U.S. 1, 10, n. 6. But see pp. 9–11, *infra.*

**QUESTIONS PRESENTED**

1. Whether this Court has jurisdiction of this appeal under 2 U.S.C. (Supp. V) 437h(b).
2. Whether this action is ripe for adjudication.

**STATUTES INVOLVED**

The relevant statutory provisions are set forth at J.S. App. III.

**STATEMENT**

1. Section 315(c) of the Federal Election Campaign Act of 1971, as added, 88 Stat. 1287, 2 U.S.C. (Supp. V.) 438(c), and amended, Pub. L. 94–283, 90 Stat. 481, 486, prohibits the Federal Election Commission from prescribing regulations without first transmitting to Congress a statement setting forth the proposed regulations and a detailed explanation and justification of them. 2 U.S.C. (Supp. V) 438(c)(1).[1] If within 30 legislative days after receipt of such a statement, either the Senate or the House

[1] Statements concerning regulations dealing with required reports or statements by a candidate for the office of Senator, and by political committees supporting such a candidate, must be transmitted to the Senate. 2 U.S.C. (Supp. V) 438(c)(3). Statements concerning regulations dealing with required reports or statements by a candidate for the office of Representative, Delegate, or Resident Commissioner, and by political committees supporting such a candidate, must be transmitted to the House of Representatives. *Ibid.* Statements concerning regulations dealing with Presidential candidates must be transmitted to both the House and the Senate. *Ibid.*



disapproves any proposed regulation, or any portion thereof that is a single separable rule of law, then the Commission may not prescribe the disapproved regulation or portion thereof. 2 U.S.C. (Supp. V) 438(c)(2). Proposed regulations and portions thereof that are not disapproved within 30 legislative days may be prescribed by the Commission.

Prior to being reconstituted in light of *Buckley* v. *Valeo,* 424 U.S. 1, the Commission had transmitted three sets of regulations to Congress. One was vetoed by the Senate, one was vetoed by the House, and the third set, although not vetoed, was not made effective by the Commission because this Court had held, in the intervening decision in *Buckley,* that the Commission as then constituted lacked the power to issue regulations. 424 U.S. at 140–141.

Following the decision in *Buckley,* the Commission was reconstituted pursuant to the Federal Election Campaign Act Amendments of 1976, Pub. L. 94–283, 90 Stat. 475.[2] On May 26, 1976, the new Commission published for comment comprehensive proposed regulations governing such matters as disclosure of contributions, corporate and union political activity, and office accounts. 41 Fed. Reg. 21572 (J.S. App. I, p.

[2] The 1976 Amendments affected the one-house veto provision in two respects. First, the Amendments make clear that any portion of a proposed regulation constituting a "single separable rule of law" can be selectively vetoed. 90 Stat. 486. Second, the Amendments prohibit the Commission from announcing general rules of law in advisory opinions and require such general rules to be proposed as regulations subject to congressional veto. Pub. L. 94–283, 90 Stat. 482.

65a). The Commission transmitted its proposed regulations to Congress on August 3, 1976 (J.S. App. I, p. 72a). See 41 Fed. Reg. 35932.

2. On July 1, 1976, appellant, who was then a candidate for the New York Democratic nomination for United States Senator (J.S. App. I, pp. 55a–56a), brought this action against the Federal Election Commission and its two *ex officio* members, the Secretary of the Senate and the Clerk of the House of Representatives, challenging the constitutionality of the "one-house veto" provision of the Act and seeking declaratory and injunctive relief.[3]

Appellant alleged that the one-house veto was unconstitutional in several respects (J.S. App. I, pp. 20a-21a). First, he asserted that the one-house veto deprives him of his rights under the separation-of-powers doctrine by purporting to authorize a single House of Congress to disapprove Commission regulations in a manner that denies the President the opportunity to veto such congressional action. Second, he alleged that the challenged provision denies him the

[3] The complaint also challenged the validity of similar one-house veto provisions in Subtitle H of the Internal Revenue Code, 26 U.S.C. (Supp. V) 9009(c) and 9039(c), which apply to regulations promulgated by the Commission with respect to the financing of presidential primary and general elections. The challenge to the Subtitle H provisions was considered by a three-judge district court that sat with the *en banc* court of appeals below. Cf. *Buckley* v. *Valeo*, *supra*, 424 U.S. at 10, n. 6. The three-judge district court adopted the opinion of the court of appeals (J.S. App. I, p. 79a). The district court's judgment dismissing the action was entered on January 26, 1977 (J.S. App. I, p. 10a). Appellant filed a notice of appeal from this judgment to the court of appeals on March 28, 1977.



constitutional right to have laws affecting him enacted by the full legislative process, *i.e.*, passage by both Houses of Congress with the opportunity for a Presidential veto. Third, he asserted that the one-house veto discriminates against non-incumbent candidates, such as appellant then was, by allowing incumbent office holders, but not challengers, to veto Commission regulations. (One of the candidates opposing appellant for the New York Democratic nomination for Senator was then an incumbent member of the House of Representatives; in addition, the then-incumbent New York Senator was a candidate for re-election in the general election (J.S. App. I, pp. 56a–57a).) Fourth, he alleged that the one-house veto provision unconstitutionally delegates discretion to a single House of Congress to disapprove Commission regulations. Appellant also alleged that the Commission "has and will continue to modify proposed rules and regulations to correspond with what its members perceive to be the desires and wishes of Members of Congress, sometimes modifying proposed rules and regulations in such a way as to give incumbent candidates for Congress an advantage in elections over non-incumbent candidates for Congress" (J.S. App. I, p. 20a).

The district court permitted the United States to intervene as a party plaintiff, seeking declaratory relief only (see J.S. App. II, p. 6). The complaint in intervention alleged that the one-house veto provision violated the principle of separation of powers, unconstitutionally permitted the evasion of the Presidential veto requirements, unconstitutionally dele-

gated legislative power to one House of Congress, and purported to endow a single House of Congress with powers outside those specified in the Constitution (J.S. App. I, pp. 22a–27a).

3. Based upon the parties' stipulation of facts, which the district court incorporated as its findings (J.S. App. I, pp. 54a–73a), the district court certified five questions to the court of appeals on September 3, 1976 (J.S. App. I, pp. 53a–54a):[4]

> 1. Does this action challenging the constitutionality of § 315(c) of the Federal Election Campaign Act (FECA), 2 U.S.C. § 438(c), and §§ 9009(c) and 9039(c) of Subtitle H of Internal Revenue Code of 1954, 26 U.S.C. §§ 9009(c) and 9039(c), present a justiciable case or controversy under Article III of the United States Constitution?
>
> 2. Do 2 U.S.C. § 438(c), and 26 U.S.C. §§ 9009(c) and 9039(c), which allow a single House of Congress to disapprove rules and regulations, or selected portions thereof, adopted by the Federal Election Commission, violate the principles of separation of powers and checks and balances established by Articles I, II, and III of the Constitution; are they in derogation of the Presidential veto power in Article I of the Constitution; and are they in excess of the legislative powers enumerated in Article I of the Constitution?

[4] Section 314(a) of the Act, 2 U.S.C. (Supp. V) 437h(a), requires certification of "all questions of constitutionality of this Act."



> 3. Do the challenged provisions specified in questions one and two violate the right of a candidate for Federal office to Due Process of Law under the Fifth Amendment of the United States Constitution by: a) depriving him of the right to have laws affecting him enacted by the full legislative process, including passage by both Houses of Congress with the opportunity for a Presidential veto; and, b) invidiously discriminating against him in allowing incumbent officeholders, but not challengers, to veto rules and regulations of the Commission?
>
> 4. Do the challenged provisions violate the Constitution by delegating the discretion to disapprove regulations of the Federal Election Commission to a single House of Congress without fixing any standards or criteria to govern the exercise of such discretion and without requiring any statement of reasons for the exercise of such discretion?
>
> 5. Do the challenged provisions, by allowing a single House of Congress to disapprove rules and regulations, or selected portions of such rules and regulations, adopted by the Federal Election Commission, create an extra-Constitutional legislative process in [violation of Article I?]

Appellant was defeated in the New York primary election on September 14, 1976, while the case was pending in the court of appeals.

The court of appeals, in a *per curiam* opinion issued on January 21, 1977, held that the case was

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not ripe for adjudication (J.S. App. II, pp. 1–26). The court explained (J.S. App. II, p. 11):

> As to plaintiff Clark, we are hard put to find any ripe injury or present "personal stake" in whether or how rules, regulations, and advisory opinions of the Commission are reviewed by the legislature. Any ripe nexus arising out of Clark's position as a senatorial candidate vanished when he failed of nomination. As a voter Clark protested no specific veto action taken by the Congress and identified no proposed regulation tainted by the threat of veto on review. Nor does he suggest [*sic*] that facial provisions of the Act inhibit his political activities as a voter in any way. It may well be that the facial provisions of the Act, if and when implemented, might in some way inhibit his rights as a voter. On this record, however, we must dismiss his present claim as unripe.

The court held that the government's claim also was unripe because neither House had exercised the power to disapprove regulations by the reconstituted Commission (J.S. App. II, pp. 11–15).[5]

[5] The 94th Congress adjourned *sine die* on October 1, 1976, twenty-eight legislative days after the Commission had submitted its proposed regulations. Accordingly, regulations could not be put into effect prior to the November 1976 election (J.S. App. II, p. 15). The Commission, however, issued a statement that the proposed regulations should be taken as "an authoritative guide" in applying the election law (J.S. App. II, p. 15).

On January 11, 1977, the Commission resubmitted its proposed regulations with several amendments to the 95th Congress. 42 Fed. Reg. 15206. Neither House disapproved any of the proposed regulations within 30 legislative days, and the Commission prescribed them as final regulations effective April 13, 1977. 42 Fed. Reg. 19324.



The court of appeals concluded (J.S. App. II, pp. 15–16) that "[u]ntil Congress exercises the one-house veto, it may be difficult to present a case with sufficient concreteness as to * * * ripeness to justify judicial resolution of the pervasive constitutional issue which the one-house veto provision involved." The court indicated that its holding with respect to ripeness rested on Article III grounds but that even if the constitutional requirements for a case or controversy had been met "it would nevertheless refuse to reach the merits * * * under the doctrine of judicial prudence enunciated in *Samuels* v. *Mackell,* 401 U.S. 66, 73" (J.S. App. II, pp. 16–17, n. 10).

The court declined to answer any of the certified questions and instead returned the questions to the district court with instructions to dismiss the suit (J.S. App. II, pp. 17–18).[6]

## DISCUSSION

**1. Section 314(b) of the Federal Election Campaign Act, 2 U.S.C. (Supp. V) 437h(b), the statute upon which appellant relies in taking this appeal, provides that "any decision on a matter certified under subsection (a) * * * shall be reviewable by appeal directly to [this] Court * * *." In turn, Section**

[6] Judge Wilkey concurred in the result (J.S. App. II, p. 18). Judge Tamm wrote a concurring opinion in which Judges Bazelon and Wright joined (J.S. App. II, pp. 27–35). Judge Leventhal wrote a separate concurring opinion (J.S. App. II, pp. 36–51). Judges Robinson and MacKinnon each wrote separate dissenting opinions (J.S. App. II, pp. 52–82, 83–119).

314(a), 2 U.S.C. (Supp. V) 437h(a), provides for certification by the district court to the court of appeals of "questions of constitutionality of this Act * * *."

The court of appeals did not expressly decide any "matter certified under subsection (a)." To the contrary, the court formally returned all certified questions unanswered to the district court. Appellant contends (J.S. 3), however, that the court of appeals in practical effect answered the first certified question. We agree. The first certified question was whether this action presents "a justiciable case or controversy under Article III of the United States Constitution" (J.S. App. I, p. 53a). The court of appeals' decision that this case is not ripe for adjudication rested upon constitutional, not prudential, considerations. See J.S. App. II, p. 16 and n. 10. Accordingly, the court's holding of unripeness amounted to a negative answer to the first certified question.

That does not, however, end the jurisdictional inquiry. The district court was not empowered by Section 314(a) to certify a question of ripeness to the court of appeals. Ripeness has no bearing upon the "constitutionality of [the Federal Election Campaign] Act," for the Act does not purport to require premature judicial review of its provisions. Thus, insofar as it implicated considerations of ripeness, the question whether this action presents a justiciable case or controversy was improperly certified by the district court.[7] And the issue of ripeness was the only aspect

[7] The question of justiciability did raise an issue concerning the constitutionality of the Act's conferral of standing upon "any individual eligible to vote in any election for the office of President of the United States * * *." 2 U.S.C. (Supp. V) 437h(a). That issue therefore was properly before the court of appeals. But, appellant's suggestion to the contrary (Reply Br. 3–4) notwithstanding, the court did not reach that issue.



of the question of justiciability that the court of appeals decided.

In our view, Congress did not intend to require this Court to exercise appellate jurisdiction when the only issue decided by the court of appeals was one that had been improperly certified to it. Congress intended nothing more than "the expeditious review of the constitutional questions * * *." 120 Cong. Rec. 10562 (1974) (Senator Buckley). Congress did not authorize certification of questions not bearing upon the constitutionality of the Act, and it should not be understood as requiring this Court to decide such questions. Cf. *MTM, Inc.* v. *Baxley,* 420 U.S. 799; *Gonzalez* v. *Employees Credit Union,* 419 U.S. 90. In short, Section 314(b) should be read as permitting review on appeal only of decisions on matters *properly* certified under Section 314(a).

Accordingly, appeal does not lie under Section 314 (b), and appellant's jurisdictional statement must "be regarded and acted on as a petition for a writ of certiorari." 28 U.S.C. 2103.

2. a. The doctrine of ripeness normally reflects prudential as well as constitutional considerations. See generally, Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law,* 69 Mich. L. Rev. 1443 (1971). Appellant argues (Reply Br. 4), however, that Congress, in providing for judicial review in the Federal Election Campaign Act, intended to sweep away all merely prudential restrictions on

justiciability. We do not believe that that is a fair reading of the statute.

The statutory text does not, by its terms, address the issue of ripeness or prematurity. In contrast, the Act, in very broad terms, purports to confer standing on all eligible voters. See note 7, *supra*. That provision led this Court in *Buckley* v. *Valeo, supra,* to conclude that, with respect to questions of standing, Congress had "intended to provide judicial review to the extent permitted by Art. III." 424 U.S. at 12. But the Court made no similar observation with respect to questions of ripeness. Indeed, the Court's discussion of ripeness in *Buckley* treats that issue, as presented there, as turning on prudential and discretionary, not constitutional, considerations. See 424 U.S. at 113–118. Accordingly, we agree with Judge Leventhal, concurring below, that the Act "does not terminate the court's discretion" (J.S. App. II, p. 45) to dismiss an action as premature.

On the other hand, in exercising that discretion the courts must be mindful of the congressional desire for an "expeditious review of the constitutional questions," a desire that permeates the Act's judicial review provisions.[8] We believe that Congress contem-

[8] Upon the filing of a complaint, "[t]he district court immediately shall certify all questions of constitutionality * * *." 2 U.S.C. (Supp. V) 437h(a). Appeal may be taken to this Court from a decision on such questions, but appeal must be brought within 20 days. 2 U.S.C. (Supp. V) 437h(b). "It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of [such matters]." 2 U.S.C. (Supp. V) 437h(c).



plated that only the most forceful prudential considerations would lead a court to dismiss, on grounds of prematurity, a constitutionally justiciable controversy under the Act.

b. Appellant's basic contention in this case is that a legislative veto of regulations proposed by the Commission constitutionally would have no effect and would not bar the Commission from implementing those regulations. That contention, if unaccompanied by any claim of present or imminently threatened injury, would not amount to a case or controversy within the meaning of Article III. See, *e.g., United Public Workers* v. *Mitchell,* 330 U.S. 75, 89–91.

At the time appellant brought this action, the Commission, as reconstituted following the decision in *Buckley,* had not yet transmitted proposed regulations to Congress. Since then, the Commission twice has submitted regulations to Congress, and in neither instance did either House disapprove them. See note 5, *supra.* Final regulations have become effective (*ibid.*), and there is no imminent prospect of even an opportunity for exercise of the legislative veto under the Act. Nor is it inevitable that the one-house veto will be used on some future occasion. Cf. *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 143. A bare claim that a legislative veto would be ineffective therefore would not be ripe for adjudication.

In his complaint, however, appellant alleges that "[b]ecause of the necessity of avoiding a vote of disapproval by a body of Congress, the Commission has and will continue to modify proposed rules and

regulations to correspond with what its members perceive to be the desires and wishes of Members of Congress * * *" (J.S. App. I, p. 20a). In effect, appellant argues that the mere existence of the power of legislative veto can form the basis of a justiciable case or controversy, whether or not that power actually is exercised. We might agree with this argument in a case involving a challenge to regulations already promulgated where a *prima facie* showing had been made that the substance of the regulations had been altered in response to congressional requests. But this case is more doubtful: appellant attacks the Act on its face and makes only unsupported allegations of congressional influence.

In any event, although the question concededly is difficult, we believe that forceful prudential considerations support the court of appeals' holding that this action is not ripe for adjudication. It is fundamental that the federal courts do not "entertain constitutional questions in advance of the strictest necessity." *Parker* v. *County of Los Angeles,* 338 U.S. 327, 333. See generally *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346–348 (concurring opinion of Mr. Justice Brandeis). Although appellant presents "a purely legal question" (*Toilet Goods Assn.* v. *Gardner,* 387 U.S. 158, 163) that presumably could be adjudicated without the "full-bodied record" (*Public Affairs Associates, Inc.* v. *Rickover,* 369 U.S. 111, 112–113) that Judge Leventhal thought necessary (J.S. App. II, p. 46), there will be no "hardship to



the parties if judicial relief is denied at [this] stage" (*Toilet Goods Assn.* v. *Gardner, supra,* 387 U.S. at 162).

Appellant is not now, and may never be again, a candidate for federal office. If he does become a candidate at some future time, and can then show that the power of legislative veto operates to his disadvantage, he may then litigate the issue; but during the interim he suffers no injury or hardship from the absence of a final determination of the constitutionality of that power. In short, in bringing the present action appellant asks the courts not to resolve a live dispute affecting his current interests but rather to act, as courts historically have declined to do, as "the organ of political theories." *United Public Workers* v. *Mitchell, supra,* 330 U.S. at 91.

3. Neither aspect of the question of ripeness—the appropriate standard to be applied under the Act, or the proper application of that standard to the facts of this case—warrants review by this Court. The court of appeals in fact chose the standard most favorable to appellant. See J.S. App. II, p. 16 and n. 10. The essentially factual question of the correctness of the application of that standard to this case is not a matter of general importance.

The underlying constitutional issue appellant seeks to raise concerning the one-house veto unquestionably is significant. See *Buckley* v. *Valeo, supra,* 424 U.S. at 140, n. 176; see also *Atkins* v. *United States,* Ct. Cl.,

Nos. 41–76, 132–76, and 357–76, decided May 18, 1977.[9] But since that issue is both important and recurring, it is likely to reach this Court soon enough, in a case that does not present difficult threshold isues, such as those of ripeness and standing (see J.S. App. II, pp. 50–51) involved here.

Moreover, the Court should not reach the one-house veto issue in this case in its present posture, even if the Court were to grant certiorari and to conclude that that issue is ripe for adjudication. The only issue decided by the court of appeals was that of ripeness. Should this Court grant certiorari and reverse on that issue, the appropriate disposition would be to remand the remaining issues to the court of appeals for its initial consideration in accordance with Section 314 (a) of the Act. This Court ordinarily does not address issues not decided by the lower court.[10] See, *e.g.*, *Federal Trade Commission* v. *Borden Co.*, 383 U.S. 637, 647. That approach is particularly sound where, as here, the Court has no guidance or assistance from either court below on a constitutional issue of grave proportions. Since it would be inappropriate for the

[9] With respect to that issue, the United States adheres to the position, taken in the district court and the court of appeals, that the legislative veto provision in the Federal Election Campaign Act is unconstitutional. See p. 5, *supra*.

[10] Although this Court decided some issues in *Buckley* that had not been considered by the court of appeals (see 424 U.S. at 118–143), resolution of those issues avoided piecemeal review of the constitutional merits. Here the court of appeals has not decided any of the constitutional questions.



Court to decide the constitutional issue on review here, resolution of that issue properly may await other litigation.

## CONCLUSION

The jurisdictional statement should be treated as a petition for a writ of certiorari, and the petition should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
*Solicitor General.*

JUNE 1977.

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